FILED

AUG 24 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NARAYAN PRASAD NATH, Petitioner-Appellant, v. ALBERTO GONZALES, Attorney General of the United States, Respondent-Appellee.	No. 05-16557 D.C. No. CV-04-00983-PHX-JAT MEMORANDUM[*]

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted July 24, 2006
San Francisco, California

Before: HUG, MERRITT,[**] and PAEZ, Circuit Judges

---

[*]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

[**]The Honorable Gilbert S. Merritt, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

Narayan Prasad Nath, a native and citizen of Fiji, petitions for review of the Board of Immigration Appeals' ("BIA") denial of his motion to reopen. In his motion to reopen, Nath asserted that his conviction under Cal. Health & Safety Code § 11378 for possession of a controlled substance for sale was vacated, and the vacated conviction cannot serve as the basis of removal. We review the BIA's ruling on the motion to reopen for an abuse of discretion and will reverse the denial of the motion to reopen only if the BIA acted "'arbitrarily, irrationally, or contrary to law.'" *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 857 (9th Cir. 2004) (quoting *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000)). For the reasons set forth below, we deny the petition.[1]

Our jurisdiction is governed by 8 U.S.C. § 1252, as amended by § 106(a) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a), 119 Stat. 231 (2005). *See Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005). The government contends that we lack jurisdiction to review the BIA's denial of Nath's motion to reopen, pursuant to 8 U.S.C. § 1252(a)(2)(B), because it involves a decision regarding the denial of discretionary relief. Under § 1252(a)(2)(B)(i), we do not have

[1]Nath originally filed a habeas petition contesting the denial of his motion to reopen. We treat that petition as a timely filed petition for review. *See Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (9th Cir. 2005) (holding that habeas petitions pending before the courts of appeals on the effective date of the REAL ID Act should be construed as timely petitions for review).

jurisdiction to review "any judgment regarding the granting of relief under [8 U.S.C.] section 1182(h), 1182(i), 1229b, 1229c, or 1255." We have interpreted this provision's language to bar jurisdiction to review the denial of a motion to reopen "that pertains only to the merits basis for a previously-made discretionary determination under one of the enumerated provisions." *Fernandez v. Gonzales*, 439 F.3d 592, 603 (9th Cir. 2006). In other words, the BIA's decision is a "judgment regarding the granting of relief under" one of the enumerated provisions when the BIA decides that it will not exercise its discretion to reopen proceedings to consider on the merits a ground for relief previously considered and denied. *See id.* at 597-99.

Applying this interpretation of § 1252(a)(2)(B)(i), we conclude that the BIA's denial of Nath's motion to reopen is not a "judgment regarding the granting of relief under" §§ 1182(h), 1182(i), 1229b, 1229c, or 1255. First, the proceedings below did not involve any of the enumerated provisions for purposes of § 1252(a)(2)(B)(i), and the motion to reopen sought to terminate removal proceedings, a form of relief not provided by any of the enumerated provisions. Second, the motion to reopen amounted to a request for new relief, "so no prior discretionary determination existed regarding the granting of the relief sought." *Id.* at 598. Accordingly, § 1242(a)(2)(B)(i) does not deprive us of jurisdiction over the BIA's denial of Nath's motion to reopen.

Nor does § 1252(a)(2)(B)(ii) deprive us of jurisdiction over the BIA's denial of the motion to reopen. Under § 1252(a)(2)(B)(ii), we do not have jurisdiction over any "decision or action of the Attorney General . . . the authority for which is specified . . . to be in the discretion of the Attorney General." However, we have held explicitly that this jurisdictional bar does not apply to denials of motions to reopen. *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004). Moreover, we are not barred from hearing constitutional claims or questions of law, even those pertaining to otherwise discretionary determinations. *See* 8 U.S.C. § 1252(a)(2)(D); *Afridi v. Gonzales*, 442 F.3d 1212, 1218 (9th Cir. 2006).

The BIA did not abuse its discretion by denying the motion to reopen on the ground that Nath failed to establish that his vacated conviction cannot serve as the basis of removal. A vacated conviction can serve as the basis of removal if the conviction was vacated for reasons "unrelated to the merits of the underlying criminal proceedings," that is, for equitable, rehabilitation, or immigration hardship reasons. *In re Pickering*, 23 I. & N. Dec. 621, 624 (B.I.A. 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, __ F.3d __, 2006 WL 1976043 (6th Cir. July 17, 2006). But a conviction vacated because of a "procedural or substantive defect" is not considered a "conviction" for immigration purposes and cannot serve as the basis for removability. *Id.* It is unclear from the record why Nath's original conviction was

vacated by the Superior Court of Stanislaus County. The December 17, 2003, order vacating Nath's original conviction states that the conviction was vacated for "good cause," without further explanation. The record does not indicate the reasons presented by Nath in requesting that the state court vacate his conviction. Under these circumstances, Nath has not established that his conviction was vacated based on a "procedural or substantive defect" in the underlying proceedings.

Accordingly, the petition is DENIED.